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Nos. 90-954, 90-1004

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 1990

ROBERT C. RUFO,  
SHERIFF OF SUFFOLK COUNTY, et al.,  
Petitioners,  
v.

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,  
Respondents.

THOMAS C. RAPONE,  
COMMISSIONER OF CORRECTION,  
Petitioner,  
v.

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,  
Respondents.

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On Writ of Certiorari To The United States  
Court of Appeals For the First Circuit

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AMICUS CURIAE BRIEF OF THE CENTER  
FOR DISPUTE SETTLEMENT

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Susan P. Sturm  
C. Lani Guinier  
(Counsel of Record)  
University of Penn.  
Law School  
3400 Chestnut Street  
Philadelphia, PA 19104  
(215) 898-5638

Center for Dispute  
Settlement  
1666 Connecticut  
Ave., N.W.  
Suite 501  
Washington, DC  
20009

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## **INTEREST OF AMICI CURIAE**

The Center for Dispute Settlement ("CDS") is a national dispute resolution organization that has facilitated the resolution of thousands of public and private disputes, including institutional reform litigation. Since 1971, when CDS was established as a non-profit, tax-exempt organization, CDS has provided mediation, facilitation, training, and designing of systems for resolving disputes. Representatives of CDS have assisted federal courts in developing consensual remedies in a variety of institutional reform contexts.

CDS is committed to the appropriate use of public consensual dispute resolution as a means of promoting fair, effective, and accessible resolution of

public disputes. This commitment prompts a concern that a decision limiting the scope of consent decrees to the legal violation or adopting a relaxed standard of modification will dramatically limit the use and effectiveness of public consensual dispute resolution in institutional reform litigation. This result would deprive the courts and the parties of the considerable benefits of combining formal and informal processes of dispute resolution to develop remedies in these cases. The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

#### **SUMMARY OF ARGUMENT**

This brief deals specifically with the issue of the potential impact of this

case on the use of consent decrees in a wide variety of institutional reform contexts. Consent decrees enable the development of legitimate, fair, and workable remedies in institutional reform litigation. By relying on the parties to develop and approve remedial plans, the consent decree process builds on the expertise of those responsible for implementing them, and preserves the autonomy of state and local government officials.

The continued viability of consent decrees depends on the capacity to approve and enforce agreements that go beyond what the courts could order after trial. A decision that limits this capacity would remove plaintiffs' incentives to reach agreement, limit the capacity of the



parties to reach agreement, and reduce the potential of consent decrees to produce effective and fair remedies.

A relaxed standard for modifying consent decrees, such as the standard proposed by petitioners, would also threaten their continued use and effectiveness. Unless parties, particularly plaintiffs, can rely on the terms of the agreement, they will have little incentive to negotiate or approve consent decrees. A liberal standard will also create disincentives for the defendants to assume responsibility for developing and implementing a feasible remedy, and for the parties to assume responsibility for defining the terms and circumstances governing modification. Stability and enforceability are thus

essential to realizing the advantages of consent decrees as a mechanism for developing fair, legitimate, and workable remedies in institutional reform litigation.

**I. CONSENT DECREES ENABLE THE DEVELOPMENT OF FAIR, EFFECTIVE, AND LEGITIMATE REMEDIES THAT PRESERVE THE DISCRETION OF LOCAL AND STATE GOVERNMENT IN INSTITUTIONAL REFORM LITIGATION**

Consent decrees are widely used to resolve environmental, school desegregation, employment, antitrust, housing discrimination, prison, and other institutional reform litigation.

Frequently, as in this case, they are entered after a finding of liability. In addition to the potential savings of time and resources achieved by avoiding further litigation, consent decrees afford the possibility of combining formal and

informal processes of dispute resolution to enhance the effectiveness and legitimacy of institutional reform remedies. As illustrated by the process used to develop the consent decree in this case, the values of participation, reasoned decisionmaking, and local and state governmental autonomy can best be preserved through consensual processes of remedial formulation. See generally Sturm, A Normative Theory of Public Law Remedies, forthcoming in 79 Geo. L. J. (June 1991).

The process of developing a consent decree allows for substantial and meaningful participation in remedial formulation by those affected by and responsible for the targeted problem. For example, in the case under

consideration, the Sheriff of Suffolk County, the Massachusetts Commissioner of Correction, the Mayor of Boston, Boston City Councillors, and lawyers for the plaintiffs engaged in a process of developing a plan that was acceptable to all of the parties in the litigation. Sher. Pet. 15.<sup>1</sup>

This form of direct and informal participation in the remedial formulation process has a number of important advantages over traditional adversary process. See Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution,

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<sup>1</sup> "Sher. Pet." refers to the Sheriff's Petition for Writ of Certiorari. "J.A." refers to the Joint Appendix. "Sher. Brf." refers to Sheriff Rufo's Brief. "Comm. Brf." refers to Commissioner of Correction Rapone's Brief.

Paths to Justice: Major Public Policy  
Issues of Dispute Resolution 10-14 (1983).

The process of developing a consensual plan enables the participants to consult appropriate experts, exchange relevant information, and account for the range of interests and concerns of those involved. It includes the range of perspectives that must be considered to develop an effective, fair, and workable remedy.

There is evidence that remedies developed through direct party participation are more likely to be perceived as fair. See

E. Lind and T. Tyler, The Social Psychology of Procedural Justice 4-5

(1988); L. Susskind and J. Cruikshank, Breaking the Impasse: Consensual

Approaches to Public Disputes 25, 27

(1987). Participation in the process of

formulating the consent decree also increases the likelihood of acceptance of and commitment to the resulting remedy -- often a major problem in institutional reform litigation. See L. Susskind and J. Cruikshank, supra at 25; L. Bacow and M. Wheeler, Environmental Dispute Resolution 18-19 (1984); United States v. City of Miami, 664 F.2d 435, 442 (11th Cir. 1981)(en banc)("willing compliance will be more readily generated by consent decrees than would mandates imposed at the end of bitter and protracted litigation").

Finally, consent decree formulation preserves and builds on the discretion and expertise of local and state governmental officials. Those with responsibility for the institutions at issue play a key role in the remedial formulation process.

Their knowledge, concerns, and interests must be reflected and accounted for if a consensus is to be achieved. Moreover, the consent decree process in no way compromises the authority of affected governmental agencies to judge for themselves whether to approve a proposed agreement. L. Susskind and J. Cruikshank, supra at 184-85, 241-42. See United States v. City of Yonkers, 856 F.2d 444, 454 (2d Cir. 1988), reversed on other grounds sub nom. Spallone v. United States, 110 S.Ct. 625 (1990) ("By its approval of the Consent Judgment the City Council itself selected the remedy...and cannot complain that the District Court approved the agreement"); Allen v. Alabama State Bd. of Educ., 816 F.2d 575, 577 (11th Cir. 1987) ("It is, of course, right

for United States Courts to be concerned about the vitality of our federal system, but we disagree that enforcing a settlement made by a state board undermines important principles of federalism...."). The process of developing and approving a consent decree thus builds in sensitivity to both implementation concerns and officials' judgments concerning the public interest.

The consent decree process also develops a sound, workable, and principled remedy in institutional reform cases. In these cases, the legal standard does not necessarily dictate the content of the remedy or provide adequate guidance concerning which of the range of possible remedial approaches should be adopted. The parties frequently are better situated



to achieve an optimal solution that accounts for their respective interests, satisfies the relevant legal requirements, and promises to work. See McGovern, Toward a Functional Approach for Managing Complex Litigation, 53 U. Chi. L. Rev. 440, 459-60 (1986); L. Bacow and M. Wheeler, supra at 18-19. Purely legalistic remedies frequently exclude from consideration the principles most germane to a particular situation. "In a real sense, therefore, traditional adjudication may actually be a less principled process than dispute negotiation" in this context. Eisenberg, Private Ordering Through Negotiation: Dispute Settlement and Rulemaking, 89 Harv. L. Rev. 637, 657 (1976). Structured negotiation is more likely to identify the

principles relevant to the dispute and to structure a remedy that accounts for those principles. It may also enable the court to avoid imposing a remedy that is potentially more intrusive and less reflective of the technical and institutional dimensions of the problem.

The case before the Court illustrates the advantages of consent decrees as a means of developing principled, workable remedies in institutional reform litigation. Having determined that the Charles Street jail violated the prisoners' constitutional rights and must be closed, the district court charged the defendants with the responsibility of producing a plan for a new jail. Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686, 691 (D. Mass. 1971).

When the defendants failed to produce such a plan, the district court set a deadline for the closure of the jail, and ordered the acquisition and renovation of existing facilities in Suffolk and Middlesex Counties. J.A. 22, 34. All parties were dissatisfied with the judicially imposed remedy, and appealed. After further unsuccessful negotiations, the Court of Appeals held that if the defendants did not submit an acceptable plan by October 2, 1978, the Charles Street Jail would close on that date. Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98, 101 (1st Cir. 1978). It was only through the process of developing a consensual plan, building on the expertise of the parties and architectural planners, that the draconian remedy of closing the jail was

averted, and a suitable and acceptable remedial alternative was achieved. Sher. Pet. 15a. See also McGovern, supra at 465 (representatives of parties to litigation over Indian salmon fishing rights described the disadvantages of a judicially imposed resolution, including the increased intrusiveness of the court and the adverse impact on tribal relations, and recommended that a negotiated plan was preferable to a litigated one).

Thus, the values of meaningful participation, reasoned decisionmaking and respect for state and local government are preserved through a consensual process of remedial formulation. Consent decrees are a crucial mechanism for achieving

legitimate, fair, and workable remedies in institutional reform litigation.

**II. THE CONTINUED VIABILITY OF  
CONSENT DECREES DEPENDS ON THE  
COURTS' AUTHORITY TO ENFORCE  
DECREES THAT PROVIDE BROADER  
RELIEF THAN A COURT COULD HAVE  
ORDERED AFTER TRIAL**

This Court's decision in Local No. 93, Int'l. Ass'n. of Firefighters v. City of Cleveland, 478 U.S. 501, 525-26 (1986) that "a federal court is not necessarily barred from entering a consent decree because the decree provides broader relief than the court could have awarded after a trial" is essential to the use of consent decrees to resolve institutional reform litigation. One of the most significant incentives to enter into a consent decree is the desire to minimize the risk of uncertainty concerning the applicable legal standard. See Bourne, Ruminations

on the Psychology and Methodology of Settlement Negotiations, in Settlement and Plea Bargaining 1 (M. Edwards ed. 1981).

If parties cannot rely on the enforceability of their agreements in the event that the law proves to be more favorable to their adversary, the benefits obtained by reaching agreement are dramatically reduced, along with the incentives to enter into consent decrees. See M. Bacow and W. Wheeler, supra at 20 ("Uncertainty over prospects for enforcement of a potential agreement may cripple negotiations").

The capacity to achieve consent decrees in institutional reform cases also depends on the ability to trade items that are valued differently by the participants in the negotiations. These items may not

be required by the legal standard at issue. In fact, if the parties are restricted in the negotiations to the case's legal issues, their ability to reach agreement is dramatically limited. However, if the parties are able to consider other items that are not necessarily required by the legal standard, combinations of terms that are acceptable to the various parties can be fashioned. McGovern, supra at 462. This possibility stems from fact that the parties frequently value the same things differently. See id.; L. Susskind and J. Cruikshank, supra at 120.

For example, prison officials may be willing to agree to a jail design that afford inmates privacy in their cells -- something they are not constitutionally

required to provide -- in exchange for the continued use of an unconstitutional facility until a new one is constructed - - something that the plaintiffs may be legally entitled to prevent. Unless the parties can introduce and negotiate over items reflecting their basic concerns, consent decrees will be difficult to achieve.

Finally, introducing a new requirement that consent decrees be narrowly tailored to the legal violation will detract from the capacity to achieve wise, effective, and principled remedies.<sup>2</sup>

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<sup>2</sup> Local 93 establishes several conditions for the approval of consent decrees. Consent decrees must: (1) "spring from and serve to resolve a dispute within the court's subject matter jurisdiction"; (2) "'com[e] within the general scope of the case made by the pleadings;" and (3) "further the objectives of the law upon which the



A fundamental virtue of negotiated remedies is the enhanced opportunity to develop and apply principles governing the negotiations, to address the demands and concerns underlying the legal violation, and to develop an appropriate remedy. If consent decrees are limited to the remedies a court could order after trial, they frequently will not be able to proceed in relation to the principles most germane to the parties or to develop a workable, lasting resolution to the problems underlying the legal violation. See Report of the Ad Hoc Panel on Dispute Resolution, supra at Appendix 1, Table 1. Moreover, a legalistic orientation in

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complaint was based". In addition, the terms may not conflict with or violate federal law. Local 93, Int'l. Ass'n. of Firefighters v. Cleveland, 478 U.S. 501, 525 (1986).

negotiations tends to restrict the parties' creativity and willingness to engage in collaborative fact-finding and joint problem solving -- often essential to producing an appropriate remedy. See Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. Rev. 754, 793-94 (1984); L. Susskind and J. Cruikshank, *supra* at 30 ("The search for a wise resolution of differences requires a collaborative inquiry -- one that breaks down a complex problem into a series of mutually agreed-upon pieces").

**III. STABILITY AND ENFORCEABILITY ARE  
KEY ATTRIBUTES OF CONSENT  
DECREES AND REQUIRE THAT  
UNILATERAL JUDICIAL MODIFICATION  
CANNOT BE EASILY OBTAINED**

Parties, particularly plaintiffs, depend on the enduring quality of the

terms of their agreements as the prerequisite for foregoing the opportunity to litigate. Unless they have adequate assurance that they are likely to realize the benefits of their bargain, they have little incentive to negotiate or approve consent decrees. Moreover, unless the parties view themselves as bound by the terms of their agreements, they may lack the incentive to take the negotiation process seriously, to give adequate attention to their public responsibilities in crafting a consent decree, to assume responsibility for addressing problems that arise in implementing the decree, and to vigorously pursue compliance. Thus, stability and enforceability are essential to the continued use and effectiveness of consent decrees. See Report of the Ad Hoc

Panel on Dispute Resolution and Public Policy, supra at 17; L. Susskind and J. Cruikshank, supra at 31.

Several considerations motivate the parties to enter into consent decrees, each of which is undercut if a relaxed standard of modification is adopted. First, parties seek to minimize the risks of uncertainty and delay that accompany litigating to judgment. An overly liberal standard of modification, such as the standards proposed by the petitioners, Sher. Brf. 32; Comm. Brf. 56, reintroduces risks and uncertainties to the consent decree process; the future of the negotiated agreement depends on the discretion of the opposing party and the judge. A significant attraction of consent decrees is thus lost.

Second, parties are motivated to reach agreements by a desire to avoid further litigation and to achieve a final resolution of the outstanding dispute. Indeed, the consent decree at issue in this case explicitly acknowledges that the agreement was premised on the desire of all the parties "to avoid further litigation on the issue of what shall be built and what standards shall be applied to design and construction." Sher. Pet. 16a. If unilateral modification may be freely granted by the court, the parties will have little faith that their agreement will endure or that it will avoid future litigation. Indeed, by enabling the opposing party to select the timing of and circumstances surrounding litigation concerning a modification

request, petitioners' proposed modification standards may lead parties to conclude that modification litigation is inevitable and disadvantageous to a favorable presentation of their case.

Finally, agreement depends on the assurance that concessions made by parties in the process of negotiation will be balanced by provisions accommodating their interests and concerns, and that the resulting agreement will be enforced. A relaxed standard of modification undermines the parties' confidence that the trade-offs that induced them to reach agreement will be honored. Parties may be tempted to strike a balanced agreement, and then later seek modification on the points most crucial to the opposing party. If parties perceive this to be a realistic

possibility, the attraction of consent decrees may well disappear.

A relaxed standard of modification also creates powerful disincentives to assume responsibility for both the substantive terms of the agreement and the circumstances and processes for addressing problems that arise concerning its workability and enforcement. If defendants perceive that requests for modification will be freely granted, they may not take the negotiation process seriously and assume responsibility for developing an agreement that is feasible and acceptable and accounts for the range of public interests affected by the proposed remedy. The anticipation of easy judicial modification, coupled with an understandable desire to avoid litigation,

may lead defendants to make promises that they either cannot or will not keep. This will not only guarantee subsequent litigation; it will also reduce the potential of consent decrees to produce wise, principled and effective agreements.

Petitioners' proposed modification standards place courts, rather than the parties, in the position of defining the circumstances and processes for addressing problems that arise in the future. Yet the terms governing future modification are important elements of the underlying agreement. The parties are frequently better situated to craft a mechanism for addressing disputes and problems that may arise. Modifications reached by agreement preserve the advantages of participation, collaboration, and reasoned decisionmaking



that characterize consensual resolution of public disputes. Negotiations concerning the terms of modification are likely to flesh out the parties' purposes and interests, and thereby ease the courts' task in the event that consensual modifications cannot be reached. If courts freely step in and impose unilateral modifications, there will be little incentive to assume responsibility for defining the terms and circumstances governing modification, and thus to preserve many of the virtues of consent decrees described earlier.

In sum, the standards governing the modification of consent decrees are a critical determinant of the incentives to enter into consent decrees and the fairness and legitimacy of the consent

decree process. The continued viability of consent decrees depends on a modification standard that preserves the attributes of stability and enforceability.

#### IV. CONCLUSION

This case has the potential to limit drastically the availability and effectiveness of consent decrees as a means of resolving institutional reform litigation. Standards that limit the parties to the relief courts could order after trial or allow easy modification would chill plaintiffs' willingness to settle, undermine defendants' incentives to negotiate feasible and effective remedies, and seriously limit the current potential of consent decrees to produce fair, legitimate, and workable remedies in

a wide variety of institutional reform cases. For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Susan P. Sturm  
C. Lani Guinier  
(Counsel of Record)  
University of Penn.  
Law School  
3400 Chestnut Street  
Philadelphia, PA 19104  
(215) 898-5638

Center for Dispute  
Settlement  
1666 Connecticut  
Ave., N.W.  
Suite 501  
Washington, DC  
20009

